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No. 84-1746

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

K N ENERGY, INC.,
Petitioner,

v.

THE GREAT WESTERN SUGAR CO.,
Respondent.

REPLY BRIEF OF K N ENERGY, INC.

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REPLY BRIEF OF K N ENERGY, INC.

Respondent, The Great Western Sugar Company ("Great Western") has filed a Brief in Opposition to the petition of K N Energy, Inc. ("K N"). The Independent Natural Gas Association of America ("INGAA") has filed a Motion for leave to file a brief *amicus curiae* in support of K N's petition.[1]

Great Western did not address squarely the two questions presented by K N's petition. Instead, it framed

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[1] Before the Supreme Court of Colorado INGAA filed a motion for leave to participate, which was granted, and a memorandum in support of K N's petition for a writ of certiorari.

three questions of its own in a manner which distorts and obscures the issues which K N seeks to present to this Court.

K N's first question deals with whether the Colorado courts have erred in refusing to refer specified issues to the Federal Energy Regulatory Commission ("Commission" or "FERC") before attempting to dispose of the common law breach of contract claims asserted by Great Western. K N has not asked this Court to determine "[w]hether the Federal Energy Regulatory Commission . . . has exclusive jurisdiction, *such as to oust a state court of jurisdiction,* to adjudicate a suit for breach of contract . . ." (Great Western Br. in Opp. p. i; emphasis supplied.)

K N's second question relates to interruptions in service at *only one* of Great Western's four plants, a plant which is served indirectly by K N through a sale-for-resale customer purchasing gas from K N under a tariff on file with the FERC. The question is whether an award of damages to Great Western in this particular situation would constitute a violation of Section 4 of the Natural Gas Act by leaving K N with a lower rate than provided for in its filed tariff. Great Western totally obscures the issue by treating it as if it applied to K N's sales to the three directly served plants.[2] The Commission has no jurisdiction over the rates charged by K N to direct sales customers. Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), "withheld from FPC only *rate-setting* authority with respect to direct sales." *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 638 (1972).

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[2] See Br. in Opp. p. 23.

I

COMMISSION JURISDICTION OVER TRANSPORTATION DOES NOT OUST STATE COURTS OF JURISDICTION OVER BREACH OF CONTRACT SUITS; IT SIMPLY LIMITS THE ACTIVITIES OF A NATURAL GAS PIPELINE WHICH CAN BE FOUND TO BE IN BREACH OF CONTRACT IN SUCH SUITS.

Commission jurisdiction over interstate transportation of natural gas does not depend upon whether transportation is interrupted or the causes of interruption when it occurs, as Great Western suggests. (Br. in Opp. pp. 11-13) Congress drew "the transportation of natural gas in interstate commerce" within the regulatory power it delegated to the Commission in enacting the Natural Gas Act. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U.S. 507, 516 (1947). The "matter of interrupting service is one largely related . . . to transportation and thus within the jurisdiction" of the Commission. (332 U.S. at 523)

In *Panhandle* this Court referred to weather-related interruptions as curtailments,[3] terminology which K N historically used in describing interruptions. In *FPC* v. *Louisiana Power & Light Co.,* 406 U.S. 621 (1972), this Court was concerned with interruptions attributed to a gas supply shortage, but the finding of Commission jurisdiction was based on the fact that transportation in interstate commerce was involved.

Exclusive Commission jurisdiction over the transportation of natural gas by K N does not oust the Colorado courts of jurisdiction over Great Western's breach of contract suit. It merely limits the activities of K N which may be found to be in breach of contract.

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[3] 332 U.S. at 523.

The K N/Great Western contracts contain a clause making them "subject to all valid and applicable laws and orders, rules and regulations of duly constituted authorities having jurisdiction or control over" K N's facilities and gas supply or any transportation contemplated under the contracts.[4] Activities in compliance with certificate orders of the Commission, and those in accord with Commission orders, rules and regulations, policy statements and K N's tariff, cannot be in breach of those contracts. Preemption of state law under the Supremacy Clause avoids placing the pipeline in the untenable position where it is liable for breach of contract for compliance with its obligations under federal law. It is quite relevant in this respect to observe that the judgments of the Colorado courts were not based on a finding that K N was negligent, imprudent, improvident or in breach of its obligations under the Natural Gas Act.

None of the cases cited by Great Western involved the issue of exclusive Commission jurisdiction.[5] Indeed none supports conclusions different from those stated

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[4] See K N's Pet. for Writ, p. 5.

[5] At pages 14-15 of its Brief, Great Western cites a number of cases for the proposition that "a regulated company cannot abrogate its common law and other obligations merely by complying with a regulatory directive where compliance is not required or where the company could have avoided the directive's issuance or effect." W. R. Grace and Co. v. Local Union 759, 461 U.S. 757 (1983); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Regents of University System of Georgia v. Carroll, 338 U.S. 586 (1950); Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976). None of these cases involved regulatory areas in which Congress had conferred on a Federal agency the kind of exclusive jurisdiction which the FERC has been held to have over the transportation of gas in interstate commerce.

above. The sole question in *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961), was whether the state court had jurisdiction over the subject matter of a suit between a pipeline company and natural gas producers in the Hugoton Field in Kansas for overpayments made to the producers as a result of the imposition of a minimum price order of the Kansas Corporation Commission later found by this Court to be unconstitutional. This Court did not address the impact on the contract of federal regulation under the Natural Gas Act. The Court stated:

> We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi contract, not the ultimate validity of its arguments, is decisive.[6]

Great Western asserts (Br. in Opp. p. 13) that "The power to issue a directive has never carried with it, without more, the exclusive power to interpret it," citing *Great Northern Railway Company* v. *Merchants Elevator Company,* 259 U.S. 285 (1922), and *United States* v. *Western Pacific Railroad Co.,* 352 U.S. 59 (1956). But in the *Great Northern* case the need was only to determine the meaning of words in a railroad tariff which were used in an ordinary sense, and the Court concluded that "a construction given by any court, whether it be Federal or state, may ultimately be reviewed by this court, either on writ of error or on writ of certiorari; and thereby uniformity in construc-

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[6] 366 U.S. at 664. Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., Inc., 297 F.2d 561 (8th Cir. 1962), *cert. denied,* 370 U.S. 937 (1962), involved a similar suit. (See Br. in Opp. n. 14)

tion can be secured." 259 U.S. at 290-1. In *Western Pacific* the question of tariff construction was held to be within the exclusive primary jurisdiction of the ICC.

Arrangements between a pipeline and a direct customer may be established initially by contract,[7] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 339 (1956), but the obligations of the pipeline under the certificate of public convenience and necessity authorizing the service prevail over the terms of the contract should there be a conflict between them.[8] *California* v. *Southland Royalty Co.*, 436 U.S. 519, 526-7 (1978); *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588, 596-7 (3d Cir. 1977).

The Commission has not yet decided whether K N's interruptions of Great Western were in conformity with K N's regulatory obligations.[9] Until it does, the

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[7] See Br. in Opp. p. 11. Great Western asserts that the contracts with K N "date back to 1955 and . . . were renewed throughout the relevant time period without material change . . ." (Br. in Opp. p. 2). This is not correct. The service to only one plant dates back to 1955. The contracts were materially revised in 1973 in response to the Commission's Statement of Policy Order Nos. 467, *et al.*, issued in Utilization and Conservation of Natural Resources, 49 FPC 85, 217, 583 (1973). See Br. in Opp. p. 12.

[8] K N's certificates require compliance with the Commission regulations which impose a duty on K N to enforce its tariff.

[9] That matter is now pending before the Commission in K N Energy, Inc., Docket No. TC82-43-000. See K N's Pet. for Writ, n. 12. Great Western's reliance on certain Commission orders to support a thesis that the matter has already been decided contrary to K N's position is misplaced. Kansas-Nebraska Natural Gas Co., Inc., 59 FPC 854, 858-9 (1976), *aff'd* 59 FPC 851 (1977), involved a proposal to abandon service to power plants with alternate fuel capability. (See Great Western Br. in Opp. n. 11) The fact that the use of natural gas in the plants was declining (due to interrup-

Colorado courts will not be in a position to decide whether K N acted in breach of its contracts with Great Western. Should the Commission not file a pleading with this Court in response to K N's Petition for Writ of Certiorari, the Court might direct an inquiry to the Solicitor General to determine the Commission's reaction to K N's petition for writ and when the Commission will issue its final decision in Docket No. TC82-43-000 now pending before it.[10]

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tions under the storage withdrawal policy of which Great Western complains), was cited by the Commission as a reason for not pursuing the abandonment route at that time. Kansas-Nebraska Natural Gas Company, Inc., 1 FERC ¶ 61,110, p. 61,297 (1977).

Great Western improperly cites three decisions of Administrative Law Judges ("ALJs") which never became final orders of the Commission due to the fact that the Commission reversed the basic determination of the ALJ and remanded for further proceedings (58 FPC 2899 (1977)), did not act upon exceptions to the decision (6 FERC ¶ 63,055 (1979)), or has not yet acted on exceptions to the ALJ's initial decision (30 FERC ¶ 63,049 (1985)). (Br. in Opp. pp. 4, 5, 12, 15, 20 and notes 11, 13, 15 and 17) Section 8(b) of the Administrative Procedure Act provides:

> "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 USC § 557(b).

[10] See procedure followed by this Court in Arkansas-Louisiana Gas Co. v. Hall, 449 U.S. 814 (1980). Great Western is correct when it notes (Br. in Opp., p. i) that the FERC did not file with the Colorado Supreme Court, a "petition for a writ of certiorari." The Commission's filing was a motion for leave to file a brief *amicus curiae* if the Supreme Court granted certiorari. The motion stated that "the Commission has a substantial interest in the outcome of this proceeding," but the Commission did not participate further when the Colorado Supreme Court failed to grant certiorari on the question of "primary jurisdiction."

II

AN AWARD OF DAMAGES TO GREAT WESTERN WOULD BE CONTRARY TO SECTION 4 OF THE NATURAL GAS ACT.

The second question presented by K N's petition relates to whether an award of damages to Great Western would constitute an undue preference or advantage in contravention of Section 4(b) of the Natural Gas Act and a violation of the "filed rate doctrine" discussed by this Court in *Arkansas Louisiana Gas Company* v. *Hall,* 453 U.S. 571 (1981) in contravention of Section 4 of the Act.[11]

Great Western does not deny that the issue of undue preference or advantage was before the trial judge.[12] It does assert that the "filed rate doctrine" was not brought to the attention of the trial court in 1979. (Br. in Opp. p. 21) Although applicability of the filed rate doctrine to natural gas pipelines crystalized in *Arkansas Louisiana* some two years later, we

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[11] The purpose of the "filed rate doctrine" is to require the pipeline to operate in accordance with its published tariff. When a pipeline proposes to alter its prices or its practices from those detailed in its tariff, it must file a tariff change under Section 4(d) of the Act, 15 U.S.C. § 717c(d), which change is then subject to review, suspension, hearing and decision by the Commission. The texts of Sections 4(d) and 4(e) of the Act are set out in Appendix A to this Reply.

[12] Item 7 of K N's Motion requesting the trial court to refer issues to the FERC reads: "Would an award of damages by this court to Great Western constitute an undue preference or advantage in contravention of Section 4(b) of the Natural Gas Act?" See App. H to K N's Pet. for Writ, p. 74a.

submit that K N's litigating position before the trial court encompassed that defense.[12]

Great Western asserts that no undue preference or advantage can result from an award of damages because "there is nothing blocking other interruptible customers similarly situated from also bringing suit against K N and recovering appropriate damages." (Br. in Opp. p. 22) It is not clear what is meant by "similarly situated." K N has indirect interruptible customers in a number of states. Great Western has no basis for assuming that courts in other states and lower federal courts would adopt the same construction of K N's contractual obligations, Commission orders, rules, regulations and K N's tariff, and similarly reject the premise that the Commission has exclusive jurisdiction over K N's interruption of interruptible service in interstate commerce. Great Western's solution is to allow litigation against K N in state and federal trial courts of several jurisdictions. This simply ensures that there will not be the uniformity and impartiality of service in interstate commerce which the Natural Gas Act was intended to promote through uniform federal regulation by the Commission. *FPC* v. *Louisiana Power & Light Co., supra,* 406 U.S. at 634-5; *Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.,* 177 F.2d 942, 945 (6th Cir. 1949).

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[12] Item 8 of K N's motion requesting the trial court to refer issues to the FERC reads: "Would an award of damages by this court to Great Western for interruptions in service beginning in November, 1973 adversely affect the FERC's ability to carry out its responsibilities under Sections 4, 5 and 7 of the Natural Gas Act? *Ibid.*

CONCLUSION

For the reasons stated above and in K N's petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Provisions of the Natural Gas Act
(15 U.S.C. §§ 717 *et seq.*)

SEC. 4(d)

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. (15 U.S.C. § 717c(d))

SECTION 4(e)

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may sus-

pend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (15 U.S.C. § 717c(e))